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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 05 2006

SRC 05 202 50534

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a semiconductor developer and manufacturer. It seeks to employ the beneficiary permanently in the United States as a digital communications system design engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The petitioner submitted a copy of a certification from the Department of Labor, an approval notice for the original beneficiary of that certification, a withdrawal of the approved petition and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The director determined that the original beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly.

On appeal, counsel asserts that the petitioner followed all of the substitution procedures set forth in the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) Memorandum, "Substitution of Labor Certification Beneficiaries," [redacted] Associate Commissioner, HQ 204.25-P (March 7, 1996). This memorandum provides that a request for substitution where a petition for the original beneficiary is already approved should be accompanied by a request to withdraw the original petition. Upon receipt of such a request, the director is instructed to automatically revoke the original petition and transfer the labor certification to the substituted beneficiary's file. The purpose is to "ensure that the petitioner is not using the same labor certification more than once."

The petitioner filed the instant petition on July 13, 2005 accompanied by a request to withdraw the petition in behalf of the original beneficiary dated July 7, 2005.[1] On August 19, 2005, the original beneficiary adjusted to lawful permanent resident status. Thus, on October 11, 2005, the director denied the instant petition as the labor certification was no longer available for substitution.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

[1] The petitioner also filed another petition with the California Service Center on July 12, 2005. The petitioner subsequently withdrew that petition after being advised of the original beneficiary's adjustment to lawful permanent resident status. On that Form I-140, receipt number WAC-05-203-50327, the petitioner indicated that the location of the job would be in Texas. Thus, the California Service Center was not the proper office with which to file the petition. *See* 8 C.F.R. § 204.5(b).

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the CIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally*, Department of Labor Proposed Rule, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 71 Fed. Reg. 7656 (February 13, 2006).

CIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986). Moreover, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology Internati*onal, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Thus, while CIS policy permits substitutions of beneficiaries, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available.

The labor certification on which this petition is based already served as the basis of admissibility of the original beneficiary. Section 212(a)(5)(A) of the Act. Counsel provides no legal authority, and we know of none, that would allow CIS to rely on the labor certification of an adjusted alien to correct an error.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.